

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PPG INDUSTRIES INC.,	.	
	.	
Plaintiff,	.	
	.	Case No. 12-cv-03526
vs.	.	
	.	Newark, New Jersey
UNITED STATES OF AMERICA, et	.	June 27, 2016
al.,	.	
	.	
Defendants.	.	
	.	

TRANSCRIPT OF TELECONFERENCE
BEFORE THE HONORABLE MICHAEL A. HAMMER
UNITED STATES MAGISTRATE JUDGE

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1 (Commencement of proceedings at 3:34 P.M.)

2

3 THE COURT: All right. We are on the record in PPG
4 Industries versus United States of America, Civil
5 No. 12-3526.

6 Can I have appearances, please, beginning with
7 plaintiff's counsel.

8 MR. LAGROTTERIA: Joe Lagrotteria, from LeClairRyan
9 on behalf of PPG Industries.

10 MR. HUSIK: And Adam Husik from LeClairRyan as
11 well.

12 MR. BARR: Lew Barr for the United States.

13 MS. BELL: Lisa Bell for the United States.

14 THE COURT: All right. I have reviewed the
15 parties' June 23d joint letter and attachments which raise a
16 number of issues from which both sides actually raised a
17 number of issues.

18 Have the parties, since submitting that last week,
19 made any progress with trying to resolve these various issues
20 through the meet-and-confer process?

21 MR. HUSIK: Your Honor, this is Adam Husik for PPG.

22 We had a call -- the parties had a call a day or so
23 before that letter was submitted. No headway was made at
24 that time, and we've been preparing for depositions that are
25 starting -- we're in D.C. today with the depositions. So the

1 short answer is no, Your Honor.

2 THE COURT: All right. Let me deal first with the
3 issues that PPG has raised with regarding the deposition of
4 Andrew Sorokowski, as well as what it argues are production
5 deficiencies with -- by the government's production.

6 Here's -- and I want to hear what the parties have
7 to say, although, quite frankly, I'd be mildly surprised if
8 you had a whole lot to add to the fairly extensive
9 submission.

10 But what I see is this. What I see is an issue
11 with Sorokowski's ability to respond to certain areas of
12 inquiry by PPG. Frankly, what it seems like is that
13 Sorokowski essentially was the lead researcher and architect,
14 if you will, of the procedure by which the government was
15 going to gather and produce documents to PPG in this
16 litigation. It strikes me, though, that the issue appears to
17 be that he was not necessarily as well qualified or well
18 prepared as one might hope to testify about how that search
19 and culling and gathering of responsive discovery was
20 actually implemented.

21 So, for example, there are areas, to be sure, where
22 looking at the joint letter and the transcript where he
23 clearly struggled to provide responsive information. So, for
24 example, on the issue of who issued litigation holds, how
25 those were disseminated amongst the various federal agencies,

1 | what was done to ensure compliance, the factual scope of the
2 | litigation hold directives, were all areas that he clearly
3 | struggled with. I respectfully disagree with the government
4 | to the extent the government argues that PPG should be able
5 | to infer that from its privilege log.

6 | Now, it also appears to me that what happened
7 | was -- and this is, I think, to some degree,
8 | understandable -- after Sorokowski developed the procedure as
9 | the lead researcher -- and I think this is something that
10 | Mr. Barr describes in the government's section of the letter,
11 | Mr. Barr and Ms. Bell, it strikes me that what happened was
12 | that government counsel worked closely with the researchers
13 | to implement the procedure and search the records
14 | accordingly, which is all part and parcel of discharging
15 | their professional obligations.

16 | But the issue seems to be, though, that
17 | Mr. Sorokowski, for purposes of the 30(b)(6) deposition,
18 | wasn't as familiar with those actual efforts among the
19 | various researchers, as he should have been. So I understand
20 | PPG's issue with gaps in Sorokowski's testimony as a 30(b)(6)
21 | witness. Obviously, if Sorokowski were testifying solely in
22 | his personal capacity, that would be a very different tory.
23 | But he's not. He was testifying as the 30(b)(6) witness. He
24 | was offered as such in response to the topics noticed by PPG,
25 | and therefore, is presumed to have -- or have acquired

1 knowledge.

2 I understand PPG's issue with that.

3 But where I part company with PPG is I honestly
4 don't see how any of that gets them to the point where
5 additional written discovery is warranted for a couple of
6 reasons. One, the only thing that's actually presented to me
7 is that somehow I should infer from Sorokowski's inability to
8 answer with a necessary degree of specificity on those
9 issues, that as a result, it is more likely than not that the
10 government has failed to produce otherwise discoverable
11 information.

12 So -- and this is an example -- I'm going to give
13 the parties an example of a logic step that PPG makes that I
14 don't think is necessarily meritorious. PPG argues that
15 Sorokowski testified he did not review the historical records
16 that the government produced to PPG, and as a result,
17 Sorokowski, must have, it should follow, failed to consider
18 whether the government should have searched other record
19 locations.

20 That's not necessarily a leap in logic with which I
21 agree. It certainly could be the case that Sorokowski was
22 more concerned at a metadata level with which areas a record
23 location should have been searched and that government
24 counsel with the individual researchers vetted out the actual
25 process by which those were searched.

1 That could very well happen independent of whether
2 Sorokowski actually reviewed the historical records culled
3 from each of those record locations, particularly where, as
4 here -- Mr. Barr, if you had to estimate, how -- what would
5 the size of the overall production by the government to date
6 in terms of document discovery in this case be?

7 MR. BARR: Just shy of 40,000 pages.

8 THE COURT: Okay. Which is not -- look, it's far
9 from the biggest number that I've heard, but it's also hardly
10 inconceivable that Mr. Sorokowski wouldn't have reviewed each
11 and every such document.

12 So --

13 MR. BARR: Your Honor, we would -- we would add
14 that he reviewed their complaint, and on the basis of
15 extensive conversation, he was well aware of what needed to
16 be searched for.

17 THE COURT: Mm-hmm. So -- so what I don't see is
18 any actual indication that there is some document or record
19 grouping that the government is sitting on that PPG has been
20 deprived of that would meet the Rule 26 standard. Nor do I
21 see any indication that allowing new written discovery would
22 get this case any closer to revealing admissible evidence,
23 and in a case that is already north of 4 years old, I am --
24 will tell you and we've had -- had more than our fair share
25 of discovery issues in this case, I don't see a whole lot to

1 be gained from going down a rabbit hole of discovery on
2 discovery.

3 So let me turn it over to PPG. Tell me why that's
4 wrong.

5 MR. HUSIK: Thank you, Your Honor, and to be clear,
6 we're not expecting any witness to be able to sit down and
7 say on X date, this researcher reviewed that. You know,
8 these -- these record groups that we're talking about in the
9 National Archives have hundreds of thousands of cubic square
10 feet. It's a huge amount of information.

11 But the one thing Mr. -- Mr. Sorokowski did
12 establish is that the parties do not, as Mr. Barr has argued,
13 have equal access to not only the record centers, there are
14 public and there are private components of those, and not to
15 mention classified and unclassified. But he also confirmed
16 that the government researchers utilized finding aids. We
17 refer in the letter to the SF-135 --

18 THE COURT: Yeah.

19 MR. HUSIK: -- and the SF-115 forms that our
20 researchers have been denied -- specifically denied access
21 to. The web page that Mr. Barr put in the letter as to the
22 135 form is actually instruction sheets for how agencies are
23 fill the forms out -- public access. These are thing that we
24 have been denied access to.

25 So what we did in our efforts from 2013 when the

1 government answered written discovery demands, we relied on
2 those certified demands to know where the government
3 searched, both in public and private sources. We -- we
4 vetted that. We used that information to compare it to our
5 research efforts and see if there's anywhere else that we
6 should go to, both via public access or via FOIA demands for
7 things that we can't access. And we made FOIA requests, and
8 they've been -- for years now.

9 But at the deposition last week, what happened is
10 (A) we found out that the government has reviewed additional
11 record groups that were not disclosed in 2013, and Mr. Barr
12 handed over that two-page exhibit that we include in our
13 letter; it shows just a listing of numbers without
14 information as to what was searched in those groups, which,
15 again, can be voluminous, roomfuls. So that, we argue,
16 should have warranted either being turned over to us months
17 ago, if not a year ago, but certainly amendments to their
18 written discovery responses, and at that time, before the
19 dep, we could evaluate, well, we didn't go to that record
20 group, maybe we should have. We don't have access to that
21 group. We need to seek access.

22 We simply -- we're operating in a vacuum in a large
23 sense because we don't know what the government has that we
24 can't even access the --

25 So we're not seeking to reopen discovery in its

1 entirety. We're not seeking a delay in a year or anything
2 like that. We just want to have the government follow the
3 obligation to (A) amend their discovery responses, and (B)
4 give us information about where they've searched. And if
5 that's via written or via live testimony, whenever it needs
6 to be done, this is, as you know, a document-intensive case
7 about history, and we don't have access to a lot of the
8 history.

9 That's really what it boils down to, Your Honor.

10 THE COURT: Okay.

11 MR. HUSIK: We're not seeking -- we're not seeking
12 a long delay, but we just wanted the opportunity to challenge
13 these topics that were specifically noted.

14 You mentioned litigation hold. There's also the
15 freeze issue, which he brought up but couldn't get any
16 clarity on. These are important issues that go to
17 disposition of records from -- from decades ago. And we
18 submit that we should be entitled to challenge, at least
19 probe into that as a noticed topic.

20 THE COURT: All right. Let's -- let's go through
21 that.

22 So the SF-135, these are the forms that would
23 reflect the transfers to the National Archives. Right?

24 MR. BARR: Yes, Your Honor, and they are publicly
25 available. Sorokowski so testified. And we have checked

1 with the National Archives, and they have confirmed it. If
2 PPG had been denied access to the SF-135, they could have
3 told us about it. We could have addressed it.

4 THE COURT: All right. Well, let's say PPG had
5 told you about it, what would happen then?

6 MR. BARR: We could have called counsel for the
7 National Archives and made sure they had access to the 135.

8 THE COURT: Okay. All right.

9 So among other things, what -- has -- let me ask
10 this. Let me turn back to PPG.

11 Are you still unable to access the SF-135s?

12 MR. HUSIK: They're actually contained in the
13 federal record center, not the National Archives.

14 And that is accurate. If Mr. Barr is willing to
15 help us in that regard, we certainly would be willing to take
16 that offer.

17 That -- that doesn't cure, though, the fact that we
18 need to know where they searched.

19 THE COURT: Yeah, I understand that.

20 (Simultaneous conversation)

21 MR. HUSIK: Just one quick point, Your Honor.

22 THE COURT: Yeah.

23 MR. HUSIK: Mr. Sorokowski also testified then the
24 researchers, who made copied documents from the archive
25 record centers, they recorded the source information; in

1 other words, the card catalog, the -- record group. And it
2 is readily available --

3 None of that was produced to us in the case. We
4 produced with all of our documents to the government so they
5 would know our research.

6 MR. BARR: Your Honor, if I can address that
7 quickly. To the extent in the -- written into -- handwritten
8 on the documents that we obtained from the archives and the
9 federal record centers, we provided it. To the extent it
10 wasn't, we obviously could not provide it.

11 THE COURT: But is there -- Mr. Barr, is there any
12 when -- I know there is the one -- there's the one -- I don't
13 even necessarily want to call it a spreadsheet that
14 Mr. Sorokowski himself maintained? But that doesn't reflect,
15 as PPG points out, of the government research or the research
16 that the government conducted in responding to their demands,
17 because that was just -- as I -- near as I can tell, was not
18 necessarily an ad hoc list that Mr. Sorokowski himself
19 maintained, but it was never intended to be a master list for
20 all of the researchers. Correct?

21 MR. BARR: That -- that's correct, Your Honor.
22 That was something that I maintained track of.

23 And as far as the differences between what we
24 advised PPG about in 2013 and the list we provided to them on
25 the -- at -- Mr. Sorokowski's deposition, that two-page

1 document. There are very few differences. The differences
2 are trivial. And most of those trivial differences are based
3 on information that PPG itself provided to the government in
4 its request for production.

5 I'm not going to get into the details, because it's
6 not worth it, but it's -- as far as the list of documents
7 that we provided, it was an effort to be as complete as we
8 could, and the differences were very small.

9 THE COURT: Now, but there was at least -- if I
10 understood correctly, there was one -- at least one
11 organization that Mr. Sorokowski thought had been searched or
12 agency that was not on either the original list or the
13 amended that you served on them at the -- on the day of the
14 Sorokowski deposition. Correct?

15 MR. HUSIK: That's correct.

16 MR. BARR: Um --

17 MR. HUSIK: -- he testified to that.

18 MR. BARR: -- I don't -- I don't really recall
19 which entity that was.

20 MR. HUSIK: It was the record group EE -- I don't
21 have the number in my head, but there was a specific letter
22 group that, at least one, that he did recall that was on
23 either list, that's correct, Your Honor.

24 MR. BARR: We can check that, Your Honor, but
25 that -- that's not consistent with my records.

1 MR. HUSIK: But, again, Your Honor, just one minor
2 point, if I could add, when we're talking about a group, and
3 you probably saw in the transcript -- line questioning, where
4 he was asked: How is the group selected? How do you hone
5 down the 300,000 cubic feet to something manageable? And was
6 anything found in the -- in that?

7 And he was not able to answer. And to date, from
8 the two-page listing, we don't have any information
9 responding to those inquiries.

10 MR. BARR: Actually, Your Honor, that's not
11 accurate.

12 And he had the complaint. I made sure that they
13 studied it. We discussed it in detail. It indicated a
14 number of places where we needed to look. We did look. And
15 based on documents that PPG has produced to us, they were
16 looking in those same places, starting back in 2010.

17 So he had the complaint. He had the guidance and
18 instructions of counsel. So he wasn't operating in a vacuum.
19 I think PPG is leaving out a fair amount in their
20 description.

21 The finding aids he used in these indices, at least
22 with respect to the National Archives, the time periods, the
23 companies involved, the federal agencies involved, the
24 commodities involved.

25 So they -- the basis of the -- the bases for the

1 searches where we went and how we did -- narrowed things
2 down, was laid out with clarity.

3 MR. HUSIK: It was not -- we disagree.

4 THE COURT: All right. Well --

5 (Simultaneous conversation)

6 MR. BARR: -- transcript speaks for itself.

7 THE COURT: On this -- on this issue, this what I'm
8 going to order.

9 One, I'm going to order the parties first to meet
10 and confer on the issue of the SF-115s, and the issue of the
11 SF-135s.

12 And then within a week, I'd ask Mr. Barr after that
13 to communicate with counsel for the relevant agencies. I
14 don't know if it's a -- obviously, in addition to the
15 National Archives, if there are particular federal records
16 centers, but to communicate -- or agencies to communicate
17 with them to facilitate the production of the 115s -- or to
18 facilitate, rather, PPG's access to the SF-115s and 135s.
19 That's number one.

20 Number two, I am going to order that the government
21 produce another witness -- Mr. Sorokowski, because frankly --
22 and I don't certainly -- I'm certainly not second-guessing
23 Mr. Sorokowski's preparation. It just -- it struck me that
24 the problem here wasn't necessarily in the work that he did,
25 but if it's true that he didn't speak with the other

1 researchers of review his own research notes or review their
2 research notes, I can understand then why he struggled to
3 testify as a Rule 30(b)(6) witness about the implementation
4 by others of his -- of his sort of the protocol that he
5 developed.

6 I will leave it to Mr. Barr determine whether that
7 is Mr. Sorokowski or another individual who would be the
8 witness. But essentially the subject would be the ability to
9 describe the -- why the government -- what exact areas of
10 locations the government selected for that obtaining and
11 culling documents, and the criteria by which the government
12 narrowed its searches. And then the issue of who issued the
13 litigation hold letters, how they were disseminated, which
14 agencies received those, and what the government did to
15 ensure compliance.

16 Finally --

17 MR. HUSIK: Your Honor, if I may, all -- some of
18 these -- in the record freezes, which is separate from
19 litigation hold.

20 THE COURT: Oh, I'm sorry, wait. Say that and
21 slower, please.

22 MR. HUSIK: I apologize. The issue of litigation
23 records freezes.

24 THE COURT: Right. I'm sorry. I had omitted that,
25 but you're right.

1 Whether --

2 (Simultaneous conversation)

3 THE COURT: Whether the government --

4 (Simultaneous conversation)

5 THE COURT: Go ahead.

6 MR. BARR: I'm sorry, Your Honor.

7 THE COURT: Go ahead, Mr. Barr.

8 MR. BARR: I'm just going to say that I'm not sure
9 litigation freezes for the same -- are different than holds.

10 MR. HUSIK: I'm not sure either, Your Honor. In
11 his testimony, he clearly said that he recalled instances of
12 a freeze. I'm not sure what that is referring, but whatever
13 it is, we'd like to just probe into that.

14 THE COURT: Yeah, I thought the freeze essentially
15 was when the agency records are transmitted to the federal
16 record center, which could be either part of -- part and
17 parcel of the litigation hold or something that's done
18 independent of the litigation hold. I don't really know.
19 But he should be prepared to testify about what a freeze is
20 and whether there were any freezes instituted relevant to
21 this case.

22 Finally, there was an issue regarding -- and
23 honestly, I need some clarity from the parties on this --
24 there was an issue regarding the production of
25 Mr. Sorokowski's Microsoft Excel spreadsheet. And at one

1 point, I could have sworn PPG said that they wanted it to be
2 produced. I thought it had because I thought it was an
3 exhibit to the joint letter?

4 MR. HUSIK: No, Your Honor, it has not been
5 produced.

6 THE COURT: All right.

7 MR. HUSIK: -- the litigation -- the privilege log
8 we saw from government -- attached?

9 MR. BARR: Which listed the litigation hold
10 letters, and other related documentation.

11 Your Honor, on the subject of the litigation
12 holds --

13 THE COURT: Wait, wait, wait, wait. Before we --
14 before we go back to that, what's the government's position
15 regarding the production of the spreadsheet?

16 MR. BARR: We regard it as unnecessary. The
17 information that would be reflected on it would be -- would
18 reflect, you know, where we looked. Since the -- PPG has
19 done its own research, it has access to the archives, for
20 example. They don't need entry-level and file folder-level
21 detail.

22 THE COURT: All right. I'm going to order that
23 that be produced and here is why. One, it's not as though
24 the government is claiming that it is some sort of work
25 product. Two, I respectfully disagree with the government in

1 light of these issues that we've been discussing. I think
2 it's highly relevant. As I understand it, Mr. Sorokowski
3 created the Microsoft Excel spreadsheet to track what
4 government documents he was -- he sought to review, what he
5 actually reviewed, and what he was copied. That would
6 presumably go to the core -- or at least provide real
7 elucidation or insight into at least why he, acting as the
8 government's lead researcher, determined that specific
9 documents or category of documents were relevant, were worthy
10 of review, and what were copied.

11 And in a case where -- or document production where
12 all parties agree is sufficiently voluminous that there has
13 to be some degree of prioritization, I think that the lead
14 researcher's prioritization is indeed relevant to these
15 issues that we've been discussing.

16 So I'm going to require that that be produced.

17 Mr. Barr, you wanted to speak to the litigation
18 hold issue.

19 MR. BARR: Yes. The -- as you know, the privilege
20 log reflects the litigation hold letters slash litigation
21 freeze, memoranda that we identified. It is well established
22 that these kinds of memoranda and holds are privileged.

23 Is the Court ordering the production of those
24 litigation hold letters and memoranda?

25 THE COURT: No. No. I'm not order- -- on the

1 litigation hold issue, I'm not ordering any additional
2 document production.

3 What I'm ordering, though -- and I don't think this
4 part is privileged -- is that he should be -- or some other
5 30(b)(6) representative should be prepared to testify about
6 the subjects for which the litigation hold was implemented,
7 who issued them, and how they were disseminated out to the
8 various agencies.

9 That's what I'm principally concerned. I'm not
10 require- --

11 MR. HUSIK: --

12 (Simultaneous conversation)

13 MR. BARR: Does that -- does that include the
14 terms? You know, the subject matters on which the material
15 was supposed to be retained?

16 MR. HUSIK: Well, Your Honor, if I may, Sorokowski
17 referred to a one -- one- and two-page list of key words.

18 And I asked if those were the keywords used as far
19 as the ESI protocol in this case. And he didn't know.

20 And we would submit that that's factual information
21 of the keywords that were used to look for documents. That's
22 where it'll be in a card catalog, essentially. That -- I
23 don't see any work product there. And -- government's
24 production of that.

25 THE COURT: I don't see how it could be work

1 product if -- if, for example, what was done was these are
2 the search terms, they were negotiated between and among the
3 parties. They can't possibly be work product then.

4 MR. BARR: Yeah, I -- we don't know if they were
5 the same thing.

6 THE COURT: If they're not, though --

7 MR. BARR: Well, the ES -- the ESI agreement
8 relates to an entirely different kettle of fish, because ESI
9 didn't exist in the historical context.

10 THE COURT: Right. I guess, though, maybe I was
11 mistaken. Were -- so for the pre-ESI, those were not
12 digitized documents?

13 MR. BARR: Well, they wouldn't be reflected in, I
14 believe, except in litigation, you know, production
15 databases. They wouldn't be the kinds of emails and
16 electronic memoranda that are, you know, generated in the
17 billions today.

18 MR. HUSIK: Let me just clarify what we're
19 referring to. What I asked at deposition, Your Honor, was
20 whether or not the terms used by the research team, terms
21 like chromium and NPR and other keywords that we used for the
22 more modern emails, if those are the same words used to go
23 search the indices and find aids in the National Archives and
24 record centers. This, again, goes to what they looked at and
25 what they looked for.

1 We just want to know what that list is. We just
2 want to know what the government researchers were charged
3 with going to locate so we can assess the adequacy and where
4 they looked.

5 I'm not trying to make this complicated referring
6 to ESI. We just trying to tell where they looked and what
7 they looked for. And he identified a two-page listing that
8 refreshed his recollection. And we just want that list.
9 That's all.

10 THE COURT: So, then, why wouldn't he be able to --
11 without waiving -- because I'm sensitive to -- I'm sensitive
12 to the work product privilege to the extent that he were
13 asked to testify about specific research that he conducted at
14 the behest of Mr. Barr for the government's own litigation
15 strategy.

16 But as you've just pointed out, to the extent he's
17 conducting research in response to -- or conducting the
18 document preservation and litigation hold letter to be
19 constructed to ensure that the discovery that PPG is looking
20 for is preserved, I don't think that would be -- infringe on
21 work product.

22 Why wouldn't he be able to testify off of the list
23 that he's previously disclosed to PPG? So in other words, if
24 the inquiry were is this the entire list, does this list
25 fairly and accurately represent all of the subjects for which

1 lit holds were issued? Yes. If not, how did it deviate or
2 what's the difference?

3 Would that -- I don't see how that would
4 necessarily -- would infringe on the attorney work product?
5 In other words, he's already provided a two-page list.

6 (Simultaneous conversation)

7 THE COURT: No, no.

8 MR. HUSIK: No, he's not. He referred to it -- the
9 first time we learned of it last week. We're requesting that
10 list. I apologize if I wasn't clear in that regard. We
11 don't -- we don't have that listing.

12 THE COURT: Well -- all right. And this is -- this
13 is a list of all of the subjects for which the litigation
14 hold was to apply?

15 MR. HUSIK: I believe -- actually, I believe the
16 list goes to what research they conducted. I don't know
17 whether or not that relates to the litigation hold.

18 Now, he specifically referred to it in the research
19 efforts. We had no information as to what litigation hold
20 directive was aimed to preserve.

21 THE COURT: All right. Now, I'm -- I have to
22 confess I'm really confused.

23 MR. HUSIK: Let me -- let me try again.

24 THE COURT: All right.

25 MR. HUSIK: In connection with their research

1 | efforts, not litigation holds, he referred to a two-page list
2 | of keywords that were given out to the researchers, and they
3 | were told to use that listing to try to find all of these
4 | documents and determine where to go.

5 | That was definitely -- in litigation holds.

6 | The testimony about litigation holds, he simply had
7 | no recollection whatsoever of what the context of the hold
8 | was. So we had no information on that.

9 | It -- it's the research conducted by the government
10 | that I was speaking to in regards to the two-page listing of
11 | those terms, which we don't have.

12 | THE COURT: Okay. So with regard to the litigation
13 | hold, I would think, then, fair inquiry would be who issued
14 | the litigation holds -- and I'm really now working off of the
15 | joint letter -- who issued litigation holds? When were they
16 | issued relative to the notice of intent to sue on
17 | December 21, 2011? And who received the litigation hold
18 | letters?

19 | MR. HUSIK: And what type of information was
20 | instructed to be preserved. Correct, Your Honor.

21 | MR. BARR: Your Honor, now counsel's trying to put
22 | words in -- mouth.

23 | THE COURT: Yeah, I'm not -- I'm not -- I'm not
24 | going to allow inquiry into the specific substance of the
25 | litigation hold letters, certainly not off the top of my

1 head, because that does raise potentially a work product
2 issue that frankly I haven't researched. And --

3 MR. BARR: Attorney-client.

4 THE COURT: Or attorney-client. Yes.

5 Now, look, that can be waived, but I would need
6 much more of a showing here, and I don't have it here, to
7 show that that should be waived.

8 So I'm going to at least at this point allow
9 limited inquiry into who, when, and where, but not the what
10 or the subject matter of the litigation hold letters. If
11 there's still an issue with that at the deposition, you folks
12 can -- or following the deposition, you folks can let me
13 know.

14 MR. HUSIK: Fair enough, Your Honor.

15 THE COURT: All right. Now, is -- is PPG
16 requesting this two-page letter? Or the two-page list?

17 MR. HUSIK: The listing of the search terms he
18 referred to, yes, Your Honor.

19 THE COURT: Mr. Barr, what's your position?

20 MR. BARR: I think we would -- we would need to
21 consider that.

22 THE COURT: Yeah.

23 MR. BARR: Because we think this is -- we think
24 this has become a tempest in a teapot, and help put it to
25 bed, so we may well waive the -- the work product privilege.

1 THE COURT: I'll tell you -- I strongly advise you
2 to do -- to consider -- to consider the issue as you've said,
3 and here's why, because I think it's fair inquiry to the
4 extent that there's any deviation from the search terms. And
5 I understand that the search terms govern ESI. But the whole
6 of those search terms, though, probably is or should be a
7 pretty fair reflection of what that two-page list would be in
8 any event. The mere fact that some of those -- there may be
9 certain issues on the -- for the ESI, and that the search
10 terms the parties negotiated that would go beyond what you
11 would see, for example, in the pure paper discovery, but to
12 the extent that there's a significant deviation, that may be
13 fair inquiry by PPG.

14 But it strikes me that this is something that the
15 parties should be able to meet and confer and resolve.

16 So you folks will do that and then let me know
17 within two weeks whether there's still an issue. By way
18 of -- and I don't need an extensive letter. I simply need a
19 short letter that says you need a phone conference, because
20 there's still on issue on that. All right?

21 MR. HUSIK: Fair enough, Your Honor, thank you.

22 THE COURT: Okay. I think now if I'm not mistaken,
23 though, that takes care of PPG's side of the issues.

24 MR. HUSIK: Could we -- one issue that may
25 result -- actually. We're here in D.C. today taking phase

1 two of the government's deposition on substantive issues as
2 far as history and documents that have been produced in this
3 case. This is somewhat speculative, but in the event that
4 information comes out from the redeposition of last week and
5 there's a need to reexamine this witness as to additional
6 information, we just want to flag that potential issue that
7 may arise.

8 MR. BARR: Yeah, speculative is -- well --

9 (Simultaneous conversation)

10 MR. HUSIK: -- fact discovery end date and
11 Your Honor's firm deadlines is why I raise that right now.

12 THE COURT: Well, duly noted, but I do think it's
13 pretty speculative.

14 Okay. Let's turn to the issues regarding the P --
15 that the government has with PPG's production and PPG's
16 argument that the government did not comply with the Fifth
17 Amendment -- amended scheduling order.

18 I've got to tell you, though, Mr. Barr, when I look
19 at this and I see that of the -- one, two, three, four -- of
20 the nine deposition dates referred to, conservatively, six of
21 them are not only beyond the 30-day provision of the March --
22 I'm sorry, the May 19th order, but were actually -- actually
23 predated even the May 19th telephone conference. Why would
24 I -- and given that the fact that the government is strongly
25 opposing any further extensions of fact discovery, a position

1 | that I happen to agree with, given that we're talking about a
2 | 4-year-old case that's still in fact discovery, why are we
3 | still talking about these April and early-to-mid-May
4 | depositions?

5 | MR. BARR: Well, the reason is the May 19 order did
6 | not exist when those April depositions were taken, for
7 | example. Two, the next paragraph, which we read together
8 | with the paragraph regarding the 30-day provision, said in
9 | any event, bring it to your attention no later than
10 | August 11.

11 | Now, we don't know why that second provision should
12 | be read out of this.

13 | And, third, if I may, these are specific,
14 | identifiable documents which were specifically described
15 | during the deposition. We don't know of any prejudice. We
16 | don't think it's going to be any delay in the overall
17 | schedule. Just saying, well, this is prejudicial and this is
18 | untimely doesn't make it so.

19 | MR. HUSIK: If I -- respond briefly, they're not
20 | all discrete requests. We had a meet-and-confer this week,
21 | and as pointed out in the joint letter, the items that we
22 | could quickly take off the list, we did, and pointed to Bates
23 | numbers and things we produced already.

24 | There are certain new requests that are for --
25 | well, in one instance, a report doesn't even exist that

1 Mr. Barr wants produced, and we're going to argue burden, a
2 listing of all the invoices in this case that relate to
3 certain POs, is something that -- definitely create, but it
4 is very voluminous and time to do.

5 But a lot of these things he's asking for, frankly,
6 we -- spend a lot of time looking at our million pages to see
7 if they exist under that or a different name. And go to our
8 client, and it's going to take a matter of several weeks to
9 do this.

10 And the problem with the August date that he refers
11 to is that we have objections potentially to certain of these
12 items, and we don't want to come to Your Honor in August and
13 say, hey, discovery ended three months ago, and we -- what
14 are we going to do now? That's why they're raising these
15 concerns now, because they're not all simple, here's the
16 contract you asked for, we're done with it. These are
17 voluminous request --

18 MR. BARR: Well, nothing like that gets resolved,
19 and this is, again, speculation. But none of that gets
20 resolved by refusing to talk about these things.

21 THE COURT: All right.

22 MR. HUSIK: We're always willing to talk. But
23 we're worried about timing. That's all, Your Honor.

24 THE COURT: All right. This is what I'm going to
25 do. A couple of things, one, let's go back to the May 19th

1 order. I understand the government's position, but with all
2 due respect, I disagree with it. The -- the provision
3 regarding the 30 days makes clear that any unresolved
4 disputes regarding the production of documents coming out of
5 the deposition, have to be submitted to me via joint letter
6 within 30 days of that deposition.

7 That, I think, makes it abundantly clear, if, for
8 example, on -- I don't know, say July 1, there's a dispute
9 and we get all the way to July 31st and it's not resolved
10 between and among the parties, no later than July 31st, I
11 have to get a letter; otherwise, it's waived.

12 That requirement does not read out the August 11th
13 deadline. The August 11th deadline basically makes clear
14 that any such dispute -- so, for example, even if there's a
15 deposition on August 1, that has to be a dispute out of an
16 August 1 deposition has to be in front of me by August 11.
17 As we made clear, I think -- and I don't have the transcript
18 of the May 19th conference in front of me to -- you know, as
19 to be completely fair about it, but I distinctly recall in
20 have- -- being concerned that if we didn't put a final cap on
21 any such paper-related disputes, even though those that arise
22 as a result of depositions, that we were looking at discovery
23 disputes ad infinitum. And given the procedural history of
24 this case, that's not an unfounded concern.

25 But that requirement is not coextensive or have the

1 unstated impact of extending the preceding paragraph that
2 says no later than 30 days after the deposition of such
3 witnesses. What it says is that in any event, I can't get a
4 dispute after August 11th.

5 Having said that, it strikes me that from what
6 Mr. Barr has described that at least some substantial part of
7 the documents that the government seeks are specifically
8 identifiable and should be produced by PPG.

9 I understand there may be some burden incurred as a
10 result of that, and where I draw the line is to the extent
11 there's any such request that would require PPG to create a
12 new document, to the extent that it is subject to the 30-day
13 provision, I'm not going to require PPG to do that.

14 However, though, for the April 27th through -- when
15 did I get you folks' letter? through the May 13th
16 depositions, for any such documents that the government has
17 requested that are specifically identifiable, PPG shall
18 either produce those documents or certify that no such
19 document exists.

20 Going forward, to the extent that there is any such
21 dispute, the parties are reminded it has to be raised with
22 me, one, within 30 days of the deposition, but in any event,
23 no later than August 11. So should you folks find yourselves
24 doing a deposition, say, on July 31 and there's a dispute,
25 essentially, the 30-day provision isn't what you're worried

1 about. What you're worried about is that August 11th date.
2 It's almost like in basketball, the difference between the
3 shot clock and the game clock is the best analogy I can think
4 of.

5 Having said that, the government hasn't exhausted
6 the 30 days yet with regard to the May 25th, May 26th or
7 June 6th depositions, because this letter was filed on
8 June 23d, so those three depositions are within the 30-day
9 limit.

10 Are there -- are there any disputes arising out of
11 those that I haven't already addressed there that aren't
12 covered by what we've already discussed?

13 MR. BARR: Your Honor, the May 25 and May 26
14 deposition issues -- issues, are discussed in the joint
15 submission. I don't know if PPG attached it, but we can
16 certainly provide it to the Court. It was in the June 22d
17 letter --

18 THE COURT: These are -- this is about Mr. Terril's
19 testimony?

20 MR. BARR: Yes, Mr. Terril testified on May 25 and
21 May 26.

22 THE COURT: And Ms. Kappas June 6th.

23 MR. BARR: That is correct.

24 THE COURT: Right.

25 MR. BARR: But we've not yet contacted PPG

1 regarding Ms. Kappas. We --

2 (Simultaneous conversation)

3 MR. BARR: We did raise some -- some broader issues
4 regarding Ms. Kappas, but we think it would be relatively
5 easy for PPG to answer those questions.

6 THE COURT: What I did not understand or know
7 really -- I guess, know one way or the other from -- as
8 regards Mr. Terril's May 25th and May 26th testimony and
9 Ms. Kappas's June 6th testimony is whether the documents
10 requested are specific and identifiable or whether what
11 you're talking about are something that's more vague that's
12 going to require extensive searches to see if there's such
13 responsive documents or it's going to require PPG to create
14 documents.

15 MR. BARR: Well, we understand the Court's views on
16 creation of new documents. And we will look at the request
17 made as to the documents discussed or identified in the --
18 those two days of deposition, and Ms. Kappas, and we can
19 certainly discuss that with PPG.

20 THE COURT: All right.

21 MR. HUSIK: And your -- and Your Honor, I don't
22 know if you're able to give guidance at this point, but one
23 of the issues raised in Mr. Barr's letter is inquiring if
24 certain custodians, employees of PPG, if their ESI has been
25 collected or documents produced.

1 And we produced our ESI several years ago, frankly,
2 a lot of these issues could have been raised even before
3 deposition --

4 (Simultaneous conversation)

5 MR. HUSIK: -- us to go and collect new custodians'
6 ESI and run search terms, that's not going to be a 30-,
7 60-day turnaround, as Your Honor probably knows. And there
8 may need to be a ruling as to whether or not we should be
9 required to do that, as new people that are being identified.

10 MR. BARR: Your Honor, we -- our -- the Court's as
11 a disadvantage, it doesn't have our June 22d letter. But
12 that's not what we were talking about. We're not talking
13 about ESI.

14 We inquired as to whether certain people in certain
15 positions had their records searched by PPG. That's kind of
16 a yes or a no question.

17 THE COURT: Well, I mean --

18 MR. HUSIK: With that clarity as to hard-copy
19 documents, I think that exists, Your Honor --

20 THE COURT: I'm sorry. I can't -- I can't hear,
21 and therefore, I can't follow.

22 Look, this seems to be relatively simple, because
23 it really is almost the flip side of the issues that PPG
24 raised about what the government did to review its records.

25 So if the alternative is that the government does a

1 similar 30(b)(6) deposition on this issue, but if it can be
2 resolved through a couple of relatively simple
3 interrogatories or representations or a certification by PPG,
4 it strikes me that would be a lot of simpler.

5 MR. BARR: Your Honor, may I suggest that
6 instead -- we would be happy to accept representations from
7 counsel in a written letter, and we wanted to suggest that
8 that be done with remaining issues pertaining to their
9 30(b)(6). They're -- a lot of the gaps that they've alleged
10 can certainly be addressed a lot more --

11 THE COURT: I know you raised that. You certainly
12 had raised that in your letter.

13 MR. BARR: I thought that it would be helpful to
14 exhaust that possibility before we go in to take another
15 deposition.

16 THE COURT: What's PPG's response to that?

17 MR. HUSIK: Yeah, I -- we thought we had resolution
18 on this point, but --

19 THE COURT: Well, you do. But -- but -- look, my
20 order is going to stand. That's not to say, though, that if
21 the parties -- and the order's going to because I've already
22 ordered it and I'm not -- I've learned long ago, you don't
23 renegotiate your own orders, or you'll never get anything
24 done.

25 Having said that, if the parties, between

1 themselves, can build a better mousetrap, I'm certainly not
2 going to get in their way, but to make clear, my order on
3 that's going to stand.

4 Regarding Mr. Barr's proposal as to the United
5 States and what it is willing to accept, I'm going to let the
6 parties work that out. If the government is still willing
7 to -- understanding my order as to its production obligations
8 and the 30(b)(6) is going to stand, if the government wants
9 to actually have a -- a formal representation in the form of
10 certification or testimonial evidence, I will allow that, be
11 it either a Rule 30(b) deposition or an interrogatory. Or,
12 if the government's willing to take a written represent- --
13 representation by PPG counsel, I'll leave that to the
14 government.

15 MR. HUSIK: We'll meet and confer, Your Honor. For
16 PPG, in a spirit of cooperation, will say that if could
17 possibly eliminate a deposition, if we can have a letter
18 going back and forth clarifying some information that we're
19 trying to get, maybe it will obviate the need for a
20 deposition, but time can tell. But we will try. We'll meet
21 and confer -- at this point obviously.

22 THE COURT: No. No. And the order's going to
23 stand. Look, here's what we're going to do, because --
24 because, I'm serious, obviously, about the -- as you folks
25 all know, I'm serious about the deadline set forth in the

1 fifth amended scheduling order, and that date's not going to
2 change.

3 If you folks can't resolve this, if there's still
4 any lingering issues coming out of this, you folks are going
5 to need to let me know by -- because I'm going to be out next
6 week, folks, you need to let me know by the end of this
7 week --

8 MR. BARR: Forgive me, Your Honor, I thought you
9 said advise you within two weeks.

10 THE COURT: I'm sorry. That's right.

11 The problem is we have a July 8th deadline.

12 All right. So this is what we're going to do. I'm
13 going to extend that for just one week to July 15th. You
14 folks are going to let me know by -- two weeks -- the 11th of
15 what remaining issues are. So that's the three weeks. And
16 then we're going to set up a phone conference, which we may
17 or may not need, but at least we'll have it in place, for
18 July 5th. All right?

19 MR. BARR: Very well, Your Honor.

20 MR. HUSIK: And to be clear, if there's any
21 redeposition, to be done by July 15th as well as the
22 government's production of these documents?

23 THE COURT: Yes.

24 MR. HUSIK: Okay.

25 THE COURT: Okay. So you folks are going to let me

1 know by July 11th, and actually what we're going to do is
2 we're going to have a phone conference, then, the morning of
3 the 12th.

4 How are you folks for July 12th at 11 A.M.?

5 MR. BARR: We think that's fine, Your Honor.

6 MR. HUSIK: It's fine for PPG.

7 THE COURT: All right. We'll talk then, folks, if
8 necessary. That depends on what you tell me by your joint
9 letter that you're going to get to me by close of business on
10 July 11th.

11 MR. HUSIK: Perfect. Thank you very much,
12 Your Honor.

13 THE COURT: All right. Have a good day.

14 MR. BARR: Thank you Your Honor.

15 (Conclusion of proceedings at 4:28 P.M.)
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Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 40 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ **Sara L. Kern**

29th of June, 2016

Signature of Approved Transcriber

Date

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